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No. 95-1431

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

MIDWEST MOTOR EXPRESS, INC., *et al.*,
Petitioners,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND

THOMAS C. NYHAN *
General Counsel
TERENCE G. CRAIG
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
9377 West Higgins Road
Rosemont, Illinois 60018-4938
(847) 518-9800

* Counsel of Record

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QUESTIONS PRESENTED

Central States Pension Fund assessed Midwest Motor Express for withdrawal liability under 29 U.S.C. § 1381 and sued Midwest in the Northern District of Illinois on April 26, 1994, to collect this liability. On May 4, 1994, Midwest sued Central States in the District of North Dakota seeking to have the withdrawal liability statute declared unconstitutional. Midwest's case was ordered transferred to the Northern District of Illinois where Central States' first-filed action was pending. Midwest argues, however, that the Northern District of Illinois lacks jurisdiction over Central States' case, and, therefore, this first-filed case provides no basis for a transfer of Midwest's second-filed case. For its own obscure reasons Midwest has sought to have this jurisdictional question regarding the Illinois case resolved in the District of North Dakota, the Eighth Circuit, and now this Court, but not in the Northern District of Illinois where the case resides. The court below ruled that Central States' complaint in the Northern District of Illinois invoked the jurisdiction of that court and that the district court below did not abuse its discretion in transferring Midwest's case to the Northern District of Illinois. The questions presented are—

1. Should the court below have ruled on a factual challenge to the jurisdictional sufficiency of a case not before it and pending in a district court in another circuit?

2. Does a district court's subject matter jurisdiction of an action to collect withdrawal liability depend on the timing of the complaint?

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STATEMENT OF THE CASE

Respondent Central States, Southeast and Southwest Areas Pension Fund ("Central States") is a multiemployer pension plan within the meaning of Section 4001(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1301(a)(3). In 1980 Congress amended ERISA with the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). In MPPAA Congress provided that employers who contribute to multiemployer plans are liable for withdrawal liability if they cease to have an obligation to contribute

(withdraw). *See Concrete Pipe and Products v. Construction Laborers Pension Trust*, —— U.S. ——, 113 S.Ct. 2264 (1993).

Petitioners Midwest Motor Express, Inc., *et al.* (collectively "Midwest") are a group of trades or businesses under common control within the meaning of 29 U.S.C. § 1301(b)(1) and thus constitute a single employer for purposes of ERISA's withdrawal liability provisions. Until August, 1991, Midwest Motor Express contributed to Central States' pension plan on behalf of certain of its employees. Due to a labor dispute those contributions ceased, and in April, 1994, the union was decertified. Since the cessation of contributions was permanent, Central States assessed Midwest for withdrawal liability of $2,546,439.30 payable in monthly installments of $92,576.65 pursuant to 29 U.S.C. §§ 1382 and 1399 (c)(2).

On April 26, 1994, Central States filed a complaint in the United States District Court for the Northern District of Illinois to collect the monthly payments of withdrawal liability from Midwest and for declaratory and injunctive relief. On the same day (April 26) Central States sent a letter to Midwest (received by Midwest on April 27) demanding that payments be made on the first day of each month commencing May 1, 1994. The complaint was served on Midwest on May 9, 1994. On May 4, 1994, Midwest filed a complaint in the United States District Court for the District of North Dakota seeking to have the withdrawal liability statute declared unconstitutional as applied to it and enjoin Central States from collecting withdrawal liability.[1]

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[1] Central States will hereinafter refer to the Northern District of Illinois and its case as the "Illinois court" and "Illinois case," and to the District of North Dakota and its case as the "North Dakota court" and "North Dakota case."

Central States moved to transfer venue of Midwest's North Dakota case to Illinois on the basis that Central States had filed first in Illinois. The magistrate judge granted Central States' motion on July 27, 1994. The district judge affirmed the magistrate judge on August 30, 1994. The court below affirmed the district judge on September 14, 1995.

The Illinois case did not progress. It was for many months stayed due to an injunction of the Eighth Circuit against Central States from collecting withdrawal liability. By order dated March 25, 1996, however, the Eighth Circuit has left the fate of that injunction in the hands of the Northern District of Illinois, which, Central States presumes, may now proceed with its case.[2] In addition Midwest has filed an arbitration, as it was required to do by 29 U.S.C. § 1401. The arbitration has also been stayed. Following the decision of the court below Central States sought to reactivate both the Illinois case and the arbitration. Midwest has resisted both on the grounds that this Petition is pending. Decisions are pending by arbitrator and district court. Denial of this Petition would moot the question of a stay, and those cases would proceed immediately to the merits.[3]

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[2] The Illinois court asked the parties to seek clarification from the Eighth Circuit on the viability of its injunction. In an order issued March 25, 1996, the Eighth Circuit denied the motions for clarification, stating that the status of the injunction "is a question of law for the United States District Court for the Northern District of Illinois to decide." This order is reproduced in the Appendix hereto. Accordingly there is now no impediment to the Illinois court's proceeding as it sees fit—including, especially, a ruling on its own jurisdiction that Midwest has sought.

[3] The Illinois case and the arbitration are not duplicative. The merits of any withdrawal liability dispute are committed mandatory arbitration. 29 U.S.C. § 1401. As a separate matter payments of withdrawal liability must commence immediately "notwithstanding any request for review or appeal" and must be made "until the arbitrator issued a final decision." 29 U.S.C. §§ 1399(c)(2)

Under ERISA withdrawal liability payments are to be made immediately and withdrawal liability disputes are to be resolved rapidly through mandatory arbitration. Nonetheless, two years after Central States made its demand for withdrawal liability from Midwest no payments have been made and no arbitration has been held.

REASONS FOR DENYING THE WRIT

Midwest believes that the United States District Court for the Northern District of Illinois lacks subject matter jurisdiction over a complaint filed by Central States against Midwest on April 26, 1994. Almost two years later that question has not been resolved because Midwest has used every procedural device at its disposal to prevent that Illinois district court from deciding the issue. Midwest did file a motion to dismiss or to transfer venue in that case but has resisted having that motion ruled upon by the Illinois court as long as it thinks it might get a different court to decide the question. Having failed in the courts below, Midwest now seeks to have this Court rule in effect on the motion to dismiss filed in that other case.

I. THE COURT BELOW PROPERLY DECLINED A FACTUAL INQUIRY ON A JURISDICTIONAL QUESTION PENDING BEFORE A DISTRICT COURT IN ANOTHER CIRCUIT; ITS RULING DOES NOT CONFLICT WITH OTHER CIRCUITS

Midwest filed its own complaint in the District of North Dakota on May 4, 1994. While Central States' first-filed

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and 1401(d), respectively. If the employer prevails in arbitration these payments are refundable with interest. 29 C.F.R. 2644.2(d). The Illinois case concerned only the collection of these "interim" payments and not the merits of the dispute. *See Trustees of Chicago Truck Drivers v. Central Transport*, 935 F.2d 114, 117 (7th Cir. 1991). Only after the arbitrator's final award is the district court entitled to reach the underlying dispute. *See Robbins v. Lady Baltimore Foods, Inc.*, 868 F.2d 258, 264 (7th Cir. 1989).

complaint seeks to collect withdrawal liability owed under 29 U.S.C. § 1381, Midwest's complaint seeks to have that statute declared unconstitutional as applied to Midwest. Since both complaints arose from the same subject matter,[4] they presented an apt case for application of the Eighth Circuit's "first-filed rule" to determine which of these two courts should decide the case. *See Northwest Airlines, Inc. v. American Airlines, Inc.*, 989 F.2d 1002, 1006 (8th Cir. 1993).

Midwest argues that while Central States' complaint was filed first, it was premature. Thus, Midwest argues, its own complaint was really first. Central States disagrees. Both parties filed motions to transfer the other's case to their chosen forum. The North Dakota court ruled first (on Midwest's complaint), holding that Central States' Illinois complaint was first-filed and that the North Dakota case should, therefore, be transferred to Illinois. In transferring the case the district court denied Midwest's motion to enjoin Central States from proceeding in Illinois. Midwest appealed this denial of the injunction. Midwest argued to the court below that the district court had abused its discretion in denying the injunction because it should have seen that the Illinois court lacked jurisdiction and, therefore, it should have refused to transfer the case.[5] Rejecting this argument, the Eighth Circuit affirmed the district court. The question before the Eighth Circuit was not really whether the Illinois court lacked jurisdiction. Rather the question was whether the North Dakota court abused its discretion in deferring to the Illinois court. Noting that Central States

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[4] Midwest's constitutional question is really just a defense to Central States' collection action. Midwest's action is maintained by virtue of the Declaratory Judgment Act, 28 U.S.C. § 2201.

[5] The transfer order by itself would not have been appealable. The appeal of the denial of the injunction provided Midwest a backdoor to an appeal of the transfer order under Eighth Circuit law. *See Emerson Elec. Co. v. Black & Decker Mfg. Co.*, 606 F.2d 234, 237 (8th Cir. 1979).

had properly pleaded subject matter jurisdiction, the Eighth Circuit found no abuse of discretion.

Distinguishing between a facial pleading of jurisdiction and the factual predicate for that jurisdiction, Midwest now argues that the Eighth Circuit should have found no factual predicate for jurisdiction in the Illinois court. What Midwest does not explain, however, is why the Eighth Circuit, rather than the Northern District of Illinois, should decide that question. Midwest cites this court's ruling in *KVOS, Inc. v. Associated Press*, 299 U.S. 269 (1936), as a basis for a factual inquiry into the subject matter jurisdiction of a district court, but Midwest fails to point out that that inquiry should take place in the district court where the complaint was filed. *KVOS* does not even remotely suggest that it would be appropriate for a different district court to make a factual inquiry into a case not before it. The same is true of the seven circuits with which Midwest claims the court below is in conflict. In each of those cases it fell to the district court with whom the case was filed to determine its jurisdiction. Midwest cites no case holding that a district court must (or even may) make a factual inquiry into the jurisdiction of another district court.

Thus Midwest has manufactured a conflict where there is none. The court below has left it to the Illinois district court to decide its jurisdiction. This is wholly consistent with all cases cited by Midwest. The Illinois court's ultimate decision may be appealed to the Seventh Circuit. It would be inappropriate for the Eighth Circuit to intervene.

The court below did all that was required of it. It considered an appeal of the denial of an injunction and found no abuse of discretion. It noted that Central States had properly pleaded the jurisdiction of the Illinois district court but did not make a factual inquiry into that pleading. The court below appropriately deferred further inquiry to the Northern District of Illinois.

II. THE DECISION OF THE COURT BELOW DOES NOT CONFLICT WITH OTHER CIRCUITS ON WHEN JURISDICTION FIRST ARISES OVER A WITHDRAWAL LIABILITY ACTION BECAUSE NONE HAVE DECIDED THAT QUESTION

Midwest also argues that the facts pleaded by Central States in its Illinois complaint do not support the jurisdiction of that court and that the Eighth Circuit should have noted this and ruled for Midwest. Of course this begs the question why Midwest has not pursued this point in the Northern District of Illinois instead of delaying that court for two years while Midwest tried to overturn a transfer order of a different court in a different case. In any event Midwest is simply wrong on its jurisdictional argument.

The statute, 29 U.S.C. § 1382, provides that a multiemployer pension plan like Central States faced by a withdrawal of an employer like Midwest "shall (1) determine the amount of the employer's withdrawal liability, (2) notify the employer of the amount of the withdrawal liability, and (3) collect the amount of the withdrawal liability from the employer." To Midwest, however, these words mean (1) determine the amount, (2) then write a letter to the employer demanding payment, and (3) then, and only then, sue the employer. Having changed the words of the statute to suit itself, Midwest then argues that a written demand letter is a jurisdictional prerequisite to a lawsuit to collect withdrawal liability. Midwest is wrong for several reasons.

First, the general rule is that even if a statutory requirement is mandatory, that does not in and of itself transform the requirement into a jurisdictional requirement. Thus, for example, although arbitration of withdrawal liability disputes is mandatory, the courts of appeals have uniformly held that courts do not lack subject matter jurisdiction over withdrawal liability cases brought to them before arbitration. *See e.g. McDonald v. Centra*, 946

F.2d 1059, 1063 (4th Cir. 1991). Jurisdiction under 29 U.S.C. § 1451 is established when a pension plan is adversely affected by the act or omission of a party under ERISA. Midwest admits it withdrew from Central States and thus, unless it succeeds on its constitutional challenge, Midwest owes Central States withdrawal liability that it has not paid. Thus, Central States had a cause of action because it was adversely affected by the withdrawal of Midwest, and, under 29 U.S.C. § 1451(a), Central States was entitled to sue Midwest even if it meant anticipating (correctly) by several days that Midwest would refuse to pay.

Second, there is no prerequisite of a written demand letter. The statute only requires notice to the employer. It does not say what form that notice must take, but only that it inform the employer of the amount and schedule of payments and demand payment. 29 U.S.C. § 1399 (b)(1). Here Central States filed a complaint that notified Midwest of the amount (¶ 9) and schedule of payments (¶ 10) and the complaint itself constituted the demand.[6] *See* Petition, Appendix F, at 18a-22a.

Several courts of appeals have considered precisely whether a judicial notice to an employer in the form of a complaint or claim in bankruptcy may fulfill the statutory notice requirements and have concluded it does. *Central States v. Slotky*, 956 F.2d 1369, 1379 (7th Cir. 1992) ("a technical violation of the bankruptcy rules would not invalidate the pension fund's filing as effective notice" under [MPPAA]"); *Bowers v. Transportacion Maritima*, 901 F.2d 258, 263 (2nd Cir. 1990) (notice effected by service of complaint). No court of appeals has held to the contrary.

Midwest further argues that a district court does not have jurisdiction over a matter until the cause of action has "accrued." Citing several courts of appeals, Midwest

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[6] Simultaneously Central States sent a demand letter to Midwest but either was sufficient to satisfy § 1399(b)(1).

argues that a withdrawal liability action does not accrue until an employer fails to timely pay the liability. Since, it argues, Central States filed its complaint against Midwest before the first payment of withdrawal liability was due, Central States' cause of action had not yet accrued, and the court lacked subject matter jurisdiction.

What Midwest overlooks is that "accrual" of a cause of action is not a jurisdictional term. In the cases cited by Midwest, the courts have asked what the latest date was upon which a cause of action accrues for purposes of the running of a statute of limitations. This is not the same question as what the earliest date was upon which a cause of action arose for purposes of bringing a lawsuit. None of the cases cited by Midwest holds that a pension plan may not sue earlier than the latest day on which the action for withdrawal liability accrues. Indeed several of these courts have entertained actions where the plan sued for payments pending arbitration (as Central States did here). *Penn Electric Co. v. United Retail and Wholesale Emp.*, 792 F.2d 45, 46 (3rd Cir. 1986); *Teamsters Joint Council No. 83 v. CenTra, Inc.*, 947 F.2d 115 (4th Cir. 1991); *Trustees of Chicago Truck Drivers v. Central Transport, Inc.*, 935 F.2d 114 (7th Cir. 1991). Under Midwest's theory that a cause of action does not accrue until after arbitration, each of these cases were without jurisdiction. Obviously the courts relied upon by Midwest do not treat the statute of limitations accrual rule as a jurisdictional rule as well.[7]

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[7] One court of appeals has held that the cause of action for withdrawal liabliity accrues for statute of limitations purposes on the date of the employer's withdrawal from the plan. *Bay Area Laundry v. Ferbar Corp.*, 73 F.2d 971 (9th Cir. 1996). Whether or not that court is right for purposes of the statute of limitations, it is certainly right for purposes of bringing a lawsuit. Here Midwest withdrew when its contributions ceased in August, 1991. Central States' lawsuit on April 25, 1994, was thus not premature. (The Ninth Circuit is in conflict with these other circuits on the statute of limitations question, but that issue is not presented by this case.)

Further, Central States sought declaratory and injunctive relief—a claim it was entitled to bring under 28 U.S.C. § 2201. A declaratory action will lie "whether or not further relief is or could be sought." *Id.* In a separate count Central States sought the withdrawal liability payments, the first of which was due only five days after the complaint was filed. In its complaint Central States also sought "An order compelling defendant Midwest to make its future withdrawal liability payments. . . ." Complaint: Petition Appendix F at 21a. There is no jurisdictional fault in this pleading.[8]

In any event the court below did not rule on this question, so it cannot be in conflict with other circuits. Noting that there was jurisdiction properly pleaded in the Illinois complaint, the court below left to the Illinois court to make such inquiry as to resolve its own jurisdiction. That sensible decision conflicts with no other court of appeals.

CONCLUSION

There is no conflict between the court below and any other court of appeals on the questions presented. The petition for certiorari should be denied.

Respectfully submitted

THOMAS C. NYHAN *
General Counsel
TERENCE G. CRAIG
CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND
9377 West Higgins Road
Rosemont, Illinois 60018-4938
(847) 518-9800

* Counsel of Record

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[8] In addition Midwest became delinquent in its first payment five days after Central States filed its complaint. This was May 1, 1994, and three days before Midwest filed its complaint. If there were a jurisdictional question in the Illinois court before May 1, there certainly could be none after May 1.